

**IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF OKLAHOMA**

FREDRICK T. HEINKEN,)	
)	
Petitioner,)	
)	
v.)	Case Number CIV-05-812-C
)	
HASKELL HIGGINS, Warden,)	
)	
Respondent.)	

MEMORANDUM OPINION

Now before the Court is a Notice of Appeal filed by Petitioner Fredrick T. Heinken (Heinken), a prisoner appearing pro se. The Court construes Heinken's Notice of Appeal as a Motion for Certificate of Appealability (COA) to appeal the Court's denial of his Petition for Writ of Habeas Corpus brought under 28 U.S.C. § 2254. See 28 U.S.C. § 2253(c)(1)(A); Montez v. McKinna, 208 F.3d 862, 867 (10th Cir. 2000) (holding that a state prisoner must obtain a COA to appeal the denial of a § 2254 habeas petition).

The Court may grant Heinken a COA "only if the applicant has made a substantial showing of the denial of a constitutional right." 28 U.S.C. § 2253(c)(2). The Court previously denied Heinken's § 2254 motion on the ground that it was untimely filed and not subject to equitable tolling; therefore, the Court did not address the merits of his constitutional claim. (Report and Recommendation, Dkt. No. 8; Order, Dkt. No. 10.) As a result, the requisite "substantial showing" Heinken must make is two-fold: "that jurists of reason would find it debatable whether the petition states a valid claim of the denial of a constitutional right[,], and that jurists of reason would find it debatable whether the district

court was correct in its procedural ruling.” Slack v. McDaniel, 529 U.S. 473, 484 (2000). Heinken is not tasked with demonstrating that his appeal will succeed. Miller-El v. Cockrell, 537 U.S. 322, 337 (2003).

Here, Heinken fails to make the requisite showing. Therefore, Heinken’s Motion for Certificate of Appealability (Dkt. No. 12) is **DENIED**.

IT IS SO ORDERED this 10th day of January, 2006.



ROBIN J. CAUTHRON
United States District Judge